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IN THE

Supreme Court of the United States

October Term, 1962

No. 170

LOUIS FINKELSTEIN and LOUIS SCHAEFFER,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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Pertinent Provisions of the United States Constitution

Amendment I of the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.".

Amendment XIV, Section 1 of the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Statute

The relevant portions of Section 1141 of the New York Penal Law, upon which the informations are based, read as follows:

> "A person who * * * has in his possession with intent to sell, lend, distribute, give away, show or transmute * * * any obscene * * * book * * * [i]s guilty of a misdemeanor * * *"

Statement of the Case

History of the Proceedings

The proceedings which the petitioners are urging this Court to review have been twice through the New York courts both on the trial and appellate levels.

On January 20, 1959, the District Attorney of New York County filed in the Court of Special Sessions of the City of New York, County of New York, separate informations separately accusing the petitioners of two counts of the

misdemeanor of possessing obscene books ("Garden of Evil" and "Queen Bee") with intent to sell (N. Y. Penal Law, 1141) (19-24; 40-5).*

After separate trials, each petitioner was found guilty as charged and sentenced on March 25, 1960, to pay a fine of five hundred dollars or, in lieu thereof, to serve a sixty day term in New York City Prison (27-8; 47-9) [*People* v. *Schalman*, 20 Misc. 2d 1093 (Spec. Sess., N. Y. Cnty. 1960)].

The judgments were unanimously affirmed in a memorandum opinion by the Appellate Division of the New York Supreme Court, First Judicial Department on November 10, 1960 [*People* v. *Finkelstein*, 12 App. Div. 2d 457 (1st Dept. 1960)].

The New York Court of Appeals, however, reversed the judgments and ordered new trials on March 30, 1961 [*People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961), *reargument denied*, 9 N. Y. 2d 908 (1961)]. It held that scienter was an element of the crime defined in the New York obscenity statute (Penal Law, 1141), and that, therefore, the statute was not violative of the First Amendment to the United States Constitution under this Court's decision in *Smith* v. *California*, 361 U. S. 147 (1959). Although noting that the petitioners "can be charged 'with knowledge of the scope of subsequent interpretation'," the Court reversed the judgments and ordered new trials so that the petitioners who did not testify at their trials, "may have an opportunity to testify

* References, unless otherwise indicated, are to folios of the New York Court of Appeals record.

or offer proof, if they desire, in regard to the presence of salacious literature in their possession" (9 N. Y. 2d, *supra*, at p. 346).

The petitioners were retried together pursuant to stipulation (63-5) in the Court of Special Sessions of the City of New York, County of New York, and, upon being again convicted, were sentenced, on August 30, 1961, to pay a fine of five hundred dollars or, in lieu thereof, to serve a term of sixty days in New York City Prison; in addition, a term of three months imprisonment was imposed but the execution thereof was suspended (34-9, 53-7, 148-88).

The judgments were again unanimously affirmed, but this time without opinion, by the Appellate Division of the New York Supreme Court, First Judicial Department on January 18, 1962 (209-11) [*People v. Finkelstein & Schaeffer*, 15 App. Div. 2d 641 (1st Dept. 1962)].

Finally, the second judgments were affirmed by the New York Court of Appeals in a 5 to 2 vote on May 17, 1962 [*People v. Finkelstein & Schaeffer*, 11 N. Y. 2d 300 (1962)].

Evidence Adduced at Second Trial

At about 1:55 p.m. on December 30, 1958, Detective John Dell of the Commissioner's Office [of the New York City Police Department] entered the Time Square Book Bazaar, located at 225 West 42nd Street, New York County, and observed the petitioner Schaeffer at a cash register, which was located to the left of the door "as you go into the store" (71-2, 73). The premises, the officer described, was "one room on the street level" twenty feet deep and ten feet wide (92-3). The cash register, which was to the

left of the door, was mounted on a counter on a foot high platform (92). There were books "all around * * * on the left wall and on the right wall" (93).

While looking around the store, the officer discovered two soft covered books entitled "Garden of Evil" and "Queen Bee" (73-4; Exhs. 1 & 2). Showing the two books to the petitioner Schaeffer, the officer queried whether they were for sale (74, 75, 76). The petitioner Schaeffer replied, "Yes, they are, on the counter," and, in answer to a further question of the officer, noted that the price of each book was five dollars (74, 75, 76). To this offer, the officer retorted, "That's a little too much" (75). Whereupon, the petitioner Schaeffer declared, "Well, you can have the two of them for nine dollars" (75). The officer further stated, "Well, is this the best you have?" to which the petitioner Schaeffer replied, "Well anything over there is for sale" (76). The officer then gave the petitioner Schaeffer ten dollars, and the latter gave the officer the books and one dollar in change (75, 77).

At this point, the officer placed the petitioner Schaeffer under arrest (76, 77). Upon the officer's advising that the books were pornographic, the petitioner Schaeffer remarked, "I have seen much worse than these" (88). The officer then noted, "Well, you are selling them in the store, is that right?" (88). The petitioner Schaeffer replied, "yes" (88). The officer further queried, "Do you sell them to everybody?" (88). The petitioner answered, "yes, anybody that's interested buys them" (88).

A search by the officer of the store disclosed seventy additional copies of "Garden of Evil" and forty more of

"Queen Bee"—some on the shelf next to where the petitioner was standing and the balance under a counter by the petitioner (77-8). The books on the open shelf were either wrapped in cellophane or the pages thereof stapled together so that "You had to buy it as it was. You can't open it to see what was inside" (89-91). On the other hand, the books under the counter were not similarly wrapped nor sealed (89).

At about 2:15 p.m. that same day, Detective Dell also entered a store at 251 West 42nd Street, County of New York, and observed one Kleinberg—now deceased—on a platform to the left of the door near a cash register (94-5). The premises, according to the officer, was twenty by twenty-five feet and on street level (113). The cash register, which was to the left of the door, was on top of some book shelves mounted on a platform about two and a half feet high (113, 115-6). There were book-filled shelves all around the walls of the store (113). Further, there were also books stored in a rear closet (116-7).

Going to a shelf to the left of the stand where Kleinberg was standing, the officer found a copy of "Garden of Evil" and "Queen Bee" (95; Exhs. 3 & 4). The covers thereof were exposed to view (114-5). Bringing the books over to Kleinberg and ascertaining from him that they were for sale, the officer asked him if he had anything better (95). Kleinberg replied, "Well, I have another book", and, opening a medical book to a certain page, read a passage therefrom describing an act of sexual intercourse (95-6). Kleinberg noted that the price of the medical book was ten dollars (96). Kleinberg then declared that the price of "Queen Bee" and "Garden of Evil" was five dol-

lars each, but sold the two to the officer for nine dollars (97). At this point, the officer arrested Kleinberg (97-8). Kleinberg protested, however, that he was the manager and not the owner of the store (97-8).

Some five minutes thereafter, the petitioner Finkelstein entered the store, and, in his presence in answer to the officer's question, Kleinberg identified the petitioner Finkelstein as the owner of the store (99-100). The petitioner Finkelstein, at this juncture, acknowledged that he was the store owner (100-1). The officer advised the petitioner Finkelstein that he had purchased "Queen Bee" and "Garden of Evil", and the petitioner Finkelstein observed that all the books in the store were for sale (101). Referring to the books he had just purchased, the officer declared: "You know those books are pornographic", and the petitioner Finkelstein retorted, "It all depends on how you look at it. I have seen worse than this" (101). The officer, thereupon, arrested the petitioner Finkelstein (101).

A search of the premises disclosed seven more copies of "Garden of Evil" and eight of "Queen Bee" in the rear closet (102).

POINT I

The conclusion of the New York Court of Appeals that the record supported a finding of scienter and that the books are obscene is in conformity with the decisions of this Court.

A. As to Scienter

In *Smith* v. *California*, 361 U. S. 147 (1959), this Court held that a Los Angeles obscenity ordinance was violative of the First Amendment to the United States Constitution because the statute—both on its face and as interpreted by the California courts—did not include scienter as an ingredient of the crime defined therein.

The constitutionality of the New York obscenity statute, (Penal Law, §1141) under the rationale of *Smith* was presented to the New York Court of Appeals in the petitioners' first appeal from their convictions of violating that statute [see *People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961)]. That Court concluded that scienter was an ingredient of the crime defined in the statute and that, therefore, it was constitutional [*People* v. *Finkelstein*, 9 N. Y. 2d 343, 346 (1961)]. However, new trials were ordered so that the petitioners "* * * may have an opportunity to litigate and explain the presence of salacious literature in their possessions for sale" (9 N. Y. 2d, *supra*, at p. 346).

Upon reviewing the petitioner's convictions after the retrial, the Court of Appeals held that "scienter—'knowledge by * * * [defendants] of the contents of the book[s]' * * * was sufficiently proven beyond a reasonable doubt"

[*People* v. *Finkelstein*, 11 N. Y. 2d 300, 304 (1962)]. That Court noted that (*People* v. *Finkelstein*, *supra*, at p. 304):

> "The voluntary admission on the part of each defendant that he had seen worse books than those involved, the lurid statements on the covers, the $5 selling price boldly stamped on the front cover of each paper-covered book, taken together, warranted the trial court's conclusion that *scienter* was established beyond a reasonable doubt."

The petitioners contend that this holding of the Court of Appeals is not in accord with *Smith*. Firstly, they argue that, in *Smith*, this Court equated scienter to knowledge of the obscenity of the books in question (petition, p. 8). And, secondly, they assert that the "evidence does not satisfy the requirement of the *Smith* case that proof of actual knowledge must be established" (petition, pp. 7-8). Neither claim has merit.

Concerning the propriety of the definition of scienter utilized by the Court of Appeals, suffice it to say that that tribunal quoted this Court's definition of the term set forth in *Smith* [*People* v. *Finkelstein*, 11 N. Y. 2d 300, 304 (1962); *Smith* v. *California*, 361 U. S. 147, 149, 153 (1959)]. Accordingly, it is quite plain that this phase of the state court's holding is in conformity with *Smith*.

Moreover, it is crystal clear that the evidence established that the petitioners knew the contents of the books in question. The conversation of each petitioner with the arresting officer (88, 101) amply attests to that fact. The petitioners' statements, when told by the officer that the books were obscene, that they had seen much worse, were

quite obviously opinions based on familiarity with the subject matter of those books, and, thereby, constituted admissions on the element under discussion [see *People* v. *Bretagna*, 298 N. Y. 323 (1949)].

In addition, the books, priced at five dollars, contained front covers depicting women in varying states of undress, accompanied with notations as to contents. For example "Queen Bee" bore the statement:

> "The kind of book you always wished could be published. Nothing is hidden. Nothing skipped over. Every fact is revealed.
>
> "The intimate details of life's passionate adventures are told by the most daring, outspoken of modern writers. The censors hand has not touched this scorching unblushing book. Hot love scenes, forbidden pleasures, the thrills of sin and sex are offered to you in absolutely uncensored form. A gay naughty book that never pulls down the shades.
>
> "A tale that is wilder and more sizzling than a barrel of sly French novels. A Roman orgy is tame compared to some of the bedroom scenes".

Likewise, "Garden of Evil":

> "More *exciting* than 'Queen Bee' * * * More sensational than 'Stud Broad' * * * More *Thrilling* than 'Touch Me Not' * * * 'Garden of Evil' is a torrid and lusty tale with a passionate thrill on every page. Especially written for the *mature* and discriminating reader!!!!"

The inescapable conclusion arising from the evidence just recited is that the petitioners actually knew the contents of the books in issue. Although the evidence of

scienter here is circumstantial in nature, that factor does not offend against the principles laid down in *Smith*. For there, this Court stated (361 U. S. 147, 154):

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

The petitioners cite *Roth* v. *United States*, 354 U. S. 476 (1957) in support of their thesis that "[t]he cover of a book or price has no significance in proving the contents of the book *as a whole*" (petition, p. 8). *Roth*, however, is clearly inapposite for the reason that the issue there was obscenity, whereas here it is one of scienter. In *Roth*, what this Court held was that in determining whether a publication is obscene the material as a whole must be examined to determine that issue (*Roth* v. *United States*, *supra*, at p. 489).

B. As to Obscenity

The petitioner Schaeffer notes that the New York Court of Appeals found that the books in issue were sexually morbid, grossly perverse, bizarre, "disgusting" and obscene (petition, p. 9). He argues that the aforementioned terms—except the word obscene—are vague (petition, pp. 9-10). As a consequence, he asserts, "the inability to ascertain which vice was definitely ascribed to the publication * * * [requires] a reversal and dismissal of the entire information" (petition, p. 9).

It is quite evident, however, that the Court of Appeals held that the books violated the New York obscenity statute

(N. Y. Penal Law, 1141) simply because they were obscene. In this connection, the Court of Appeals stated [*People* v. *Finkelstein*, 11 N. Y. 2d 300, 305 (1962)]:

> "Schaeffer's contention that the books involved are not obscene is untenable. Having made 'an independent constitutional appraisal' of the books (*People* v. *Richmond County News*, 9 N. Y. 2d 578, 580), we find ourselves in agreement with the courts below that the books are definitely obscene (*id.*; *Roth* v. *United States*, 354 U. S. 476). Each book contains descriptions of sexual experiences, with emphasis on the abnormal. They focus 'predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification' (*People* v. *Richmond County News*, *supra*, 9 N. Y. 2d 578, 587). They unquestionably meet the *Roth* test."

In determining that the books are obscene, the Court of Appeals did so with reference to principles laid down in this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957), and in its own decision in *People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961).

This Court held in *Roth* that obscene material—matter dealing "with sex in a manner appealing to prurient interest"—was without the protection of the First Amendment of the United States Constitution (354 U. S. 476, 481, 487). It further held that the test to be utilized in determining obscenity is "whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to prurient interest". (*id.*, at p. 489).

In *Richmond County News*, the Court of Appeals declared that this Court in *Roth* was charting only "the broad

boundaries of any permissible definition of obscenity under the United States Constitution" but was not giving "specific content to the meaning of 'obscene' as it appears in * * * [the New York] statute" (9 N. Y. 2d 578, 585-586). The New York Court declared that the strictures of the New York obscenity statute (N. Y. Penal Law, 1141) "'should apply only to what may properly be termed "hard-core pornography"'" (*id.*, at p. 586). It then stated (*id.*, at p. 587):

> "Under our statute, section 1141 of the Penal Law, the test of the obscene, of the pornographic, is not in the tendency or appeal of the material, but rather in its content objectively appraised * * *. It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' * * * it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty' * * *"

Significantly, this Court in a recent case decided in June of this year [*Manual Enterprises* v. *Day*, —— U. S. ——, 82 Sup. Ct. 1432 (1962)] commented that the issue in *Roth* was whether admittedly obscene material was constitutionally protected and stated that "the Court there had no occasion to explore the application of a particular obscenity standard" (82 Sup. Ct., *supra*, at pp. 1437-1438). It noted that the New York Court of Appeals in *Richmond County News* had "considered *Roth* * * * to indicate that

only "hard-core" pornography can constitutionally be reached" " " " (*id.*, at p. 1438). Moreover, the *Richmond County News* obscenity test was there apparently approved (*id.*, at p. 1438). The Court then held that obscenity under the federal statute (18 U. S. C., § 1461) "requires proof of two distinct elements: (1) patent offensiveness; and (2) 'prurient interest' appeal" (*id.*, p. 1436).

From the foregoing, it is clear that the Court of Appeals in the case at bar held that the books in issue were not constitutionally protected material under the principles of *Roth*, that they constituted "hard-core" pornography under *Richmond County News*, and, as a consequence, were obscene.

Viewing each of the books in its entirety [*Roth* v. *United States*, 354 U. S. 476, 489-490 (1957)], there can be no question but that they constitute "hard-core pornography," and are, therefore, obscene [*People* v. *Richmond County News*, 9 N. Y. 2d 578, 586 (1961)]: "Queen Bee" is a one hundred and seventy-six page soft covered book. From the outset the book is devoted to the description of men and women engaging indiscriminately in sexual experiences —both natural and unnatural. Indeed, the theme of the book is perfectly exemplified by the opening paragraph:

> "Sybil increased the speed of her undulations. Her soft clinging lips caressed Lena's high set breasts—lingering tongued kisses set her blood on fire. She whimpered—a little shuddering gasp that quickened into a deep throated moan".

The thread—if in fact there be any—connecting the parts of the story together is merely the sequence of characters wallowing in sexual debauchery. And, persistent through-

out the book is the detailed description of the ecstasies experienced by the cast of characters. The book minutely describes three acts of sodomy engaged in by women named Sybil and Lena, as well as several sexual acts indulged in by Lena and a man named Walter. Also depicted is the rape of Sybil when she was a young school girl and her subsequent introduction to sodomy by the nurse who cared for her during her recovery from the sexual assault. Finally, there is described the sexual pleasures experienced by one Carlos upon his observing women engaged in acts of sodomy. Of similar import is the book entitled "Garden of Evil".

POINT II

The petitioners were not prosecuted under an *ex post facto* law.

The New York Court of Appeals, as we have seen, in its review of the defendant's first conviction under the New York obscenity statute (N. Y. Penal Law, 1141) held that scienter was an ingredient of the crime prohibited by that law, but ordered new trials so that the defendants "* * * may have an opportunity to litigate and explain the presence of salacious literature in their possession for sale" (9 N. Y. 2d 342, 346). It further held that the informations, although not expressly alleging scienter, were sufficient (*Id.*, at p. 346).

The petitioners contend that they may not now be charged with scienter since that requirement was added by the Court of Appeals as an element of the crime charged after it had been committed, and that to so do is to apply

an *ex post facto* law to them in violation of their constitutional rights (petition, p. 12).

At the outset, we note that the declaration by the Court of Appeals that scienter is an element of the crime in question, in reality, inures to an accused's benefit and by the same token increases the burden of the prosecution's case. By this interpretation of the statute, it is not sufficient for the People to simply show possession of obscene material with intent to sell, but it must also be proved that the possession was coupled with knowledge of the contents of the material in issue. That being so, in the case at bar under the statute as interpreted, if the People's evidence fails to demonstrate scienter, the petitioners are entitled to an acquittal. It is thus inconceivable how the interpretation in question could in any way prejudice the petitioners.

In any event, the petitioners' claim must fail for while it is apparent that the legislature may not enact penal legislation which is retroactive in effect, it is equally true that a defendant is chargeable "with knowledge of the scope of subsequent interpretation" of a statute [*Winters v. New York*, 333 U. S. 507, 514 (1948)]. Here, the Court of Appeals, in declaring scienter to be an element of the statute, was not legislating, but, rather, holding that "the definition of the crime is instinct with the idea of scienter" (9 N. Y. 2d 342, 344). In short, it was adding nothing new to the statute but merely stating that scienter had always been a requirement thereof.

The petitioners' reliance on *Lanzetta* v. *New Jersey*, 306 N. Y. 451 (1939), in this connection is misplaced (petition, p. 12). In *Lanzetta*, this Court noted that the statu-

tory crime there involved was one unknown to the common law and that it was unconstitutional on its face because of vagueness and indefiniteness. The Court then went on to hold that higher courts could not for the first time on appeal by interpretation render the statute clear and definite and thereby sustain a conviction had prior to that interpretation. Here, the crime in question was one known to the common law and scienter was an element thereunder [*Smith* v. *California*, 361 U. S. 147, 153, footnote 9 (1959); and see *People* v. *Finkelstein*, 9 N. Y. 2d, *supra*, at p. 345].

POINT III

The petitioners' claim of deprivation of opportunity to prove community standards was not sufficiently presented in the State Courts to warrant its review here.

The petitioners assert that they sought to establish in the trial court that "other books of a similar nature [to the ones in issue] were being sold throughout the city [of New York] over a long period of time and sought to place these publications in evidence as a basis of comparison" (petition, p. 11). The petitioners contend that the trial court's refusal to permit this deprived them of their constitutional right to establish a community standard in connection with the issue of obscenity (*ibid.*). This issue, however, is not reviewable in this Court since it was not sufficiently presented in the state courts.

In this connection, the record discloses that, during the petitioners' cross-examination of the police officer—the prosecution's sole witness—it was elicited that he had seen

copies of the book "Lady Chatterly's Lover" as well as magazines entitled "Gent" and "Sunshine and Health" in stores throughout New York City (121-32). Having established these facts, the petitioners offered copies of these materials into evidence to establish "the current standard in the community, of literature" (*ibid.*). The trial court rejected the offer on the ground of irrelevancy (*ibid.*).

Judge Froessel of the New York Court of Appeals in his opinion for that Court stated (11 N. Y. 2d 300, 305):

> "In our opinion, the proffered evidence was properly excluded, as it was irrelevant, to the issue of whether or not the two books sold by defendants in this case were obscene. The fact that certain other and different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold*, or *read*, or that to the average person applying contemporary community standards (*Roth* v. *United States*, *supra*) they were not obscene."

And Chief Judge Desmond in his concurring opinion declared that the issue "was not presented either to the Appellate Division or to this Court" (*id.*, at p. 305). He noted that, although the petitioners had listed "community standards" as an issue in their briefs neither they nor the prosecution had argued it therein (*id.*, at pp. 305-307).

It is thus apparent that the question of "community standard" is a mere hypothetical, imaginary, and unreal issue. It is well settled that this Court will not assume jurisdiction by the issuance of a writ of certiorari under such circumstances [see, *e.g.*, *Cincinnati* v. *Vesper*, 281 U. S. 439 (1930); *Zucht* v. *King*, 260 U. S. 174 (1923); *Seaboard Airline Ry. Co.* v. *Watson*, 287 U. S. 86 (1932)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1962